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Negligence: The Sleeping Driver's Negligence as a Matter of Law

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> lacked the capacity to understand the physical nature and consequences of his conduct: and (2) whether, because of such disease, the defendant lacked the capacity to realize that it was morally wrong to commit the harm in question.[21]

This test, like the American Law Institute test, is much like the M'Naghten test, but meets the criticism of not bearing on control of a man's conduct, that is often directed at the latter.

The test laid out by the Wisconsin Court in the *Esser* case, when properly interpretated, is geared to accomplishing the same thing. As such, it is typical of the developments in this area of the law. Further developments are sure to take place along the same line, and due to the perplexity of the problems in the area, one can do no more than wait and see what course they will follow.

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Negligence: The Sleeping Driver's Negligence as a Matter of Law—The defendant Louis Shepherd, having participated in the senior class play, attended a party at the home of one of the members of the cast. There was some liquor served at the party, but there was no evidence that anyone became intoxicated. About 3:00 A.M. the party broke up and five girls, including the plaintiff, got into Shepherd's car for the ride home. About four miles from the party the car left the road, hit a tree, and the plaintiff was injured.

The trial court found for the plaintiff, apportioning 95% of the negligence to defendant. The defendant appealed the decision on the theory that he had fallen asleep without warning and that he was not liable for his actions while asleep. The supreme court held that falling asleep while driving is negligence as a matter of law.[1]

In reaching this decision the court reasoned that falling asleep is attended by premonitory warnings or is to be expected from prior activities and experience. "We . . . hold that falling asleep at the wheel is negligence as a matter of law because no facts can exist which will justify, excuse or exculpate such negligence."[2]

Prior to this decision Wisconsin had adopted the majority view that was first enunciated by the supreme court of Connecticut in *Bushnell v. Bushnell,* where it was stated:

> (T)he mere fact of his going to sleep while driving is a proper basis for an inference of negligence sufficient to make out a prima facie case, and sufficient for a recovery, if no circumstances tending to excuse or justfy his conduct are proven.[3]

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[21] Hall, *Psychiatry and Criminal Responsibility,* 65 YALE L. J. 761, 781 (1956).
[1] Theisen v. Milwaukee Auto. Mutual Ins. Co., 18 Wis. 2d 91, 118 N.W. 2d 140 (1962).
[2] *Id.* at 98, 118 N.W. 2d at 144.
[3] 103 Conn. 583, 131 Atl. 432 (1925).

In order to overcome this inference the defendant was required to show that as a careful and cautious man he could not have foreseen that he was about to fall asleep. Such evidence had to be of a real and tangible nature, and not be vague or fanciful.[4] In the case of *Krantz v. Krantz*[5] Wisconsin apparently restricted such evidence to fainting spells and unanticipated mental or physical conditions resulting in sleep. Some of the circumstances considered by courts in deciding cases of this nature were lack of sleep, length of time at wheel, presence of premonitory symptoms, driving under the influence of liquor, and strenuous activities before driving.[6]

By virtue of this decision Wisconsin has eliminated unanticipated sleep as a possible defense in automobile accident cases. The court did preserve the defense of loss of consciousness resulting from injury inflicted by an outside force or from fainting, heart attack, or epileptic seizure.[7] However, in view of prior Wisconsin cases that dealt with the question of the sleeping motorist, it is doubtful whether this decision has changed the law in its practical end result. In no instance, in Wisconsin or elsewhere, has a driver who fell asleep at the wheel been absolved of liability for ordinary negligence.[8] In *Wisconsin Natural Gas Co. v. Employers Mutual Liability Ins. Co.*[9] the defendant had driven a total of 269 miles. On three occasions he had stopped to rest, and twice he had slept. The supreme court affirmed the directed verdict of the trial court which had found the defendant negligent as a matter of law. The court based its decision on the rationale of *Eleason v. Western Casualty & Surety Co.*[10] that a person who is aware of the fact that he is subject to spells of unconsciousness (here it was epileptic seizures) was negligent as a matter of law in driving. The Wisconsin court has also held that a guest has assumed the risk as a matter of law when he rode with a driver who fell asleep.[11]

[4] Diamond State Tel. Co. v. Hunter, 41 Del. 336, 21 A.2d 286 (1941).
[5] 211 Wis. 249, 248 N.W. 155 (1933).
[6] Annot., 28 A.L.R. 2d 12, 25 (1953).
[7] *Supra* note 1.
[8] *Supra* note 6, at 24.
[9] 263 Wis. 633, 58 N.W. 2d 424 (1952).
[10] 254 Wis. 134, 35 N.W. 2d 301 (1948).
[11] Krueger v. Krueger, 197 Wis. 588, 222 N.W. 784 (1929); Markovich v. Schlafke 230 Wis. 639, 284 N.W. 516 (1939). The defense of assumption of risk in automobile host-guest cases was abolished in Wisconsin by McConville v. State Farm Mutual Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

The *Thesien* case did not expressly convert the assumption of risk to contributory negligence as a matter of law, but it did suggest it: "However, when the guest's negligence in riding with the host consists of exposing himself to a hazard which is found to be causal negligence on the part of the host, the guest's negligence would *necessarily* be a cause of his injuries." (emphasis added) 18 Wis. 2d. 91, 104, 118 N.W.2d. 140, 147 (1962). Such a determination does not result in an absolute bar to recovery as was true of assumption of risk. It merely renders the issue of the guest's right to recovery subject to the comparative negligence statute, §331.045. Wis. Stat. (1961).

In only one reported Wisconsin case in which the defendant relied on unanticipated sleep as a defense has the question of his negligence been submitted to the jury. The jury returned a verdict for the plaintiff.[12] In view of these prior decisions the *Theisen* case seems to be merely the expression of a judicial opinion that the theoretical facts that could excuse a sleeping motorist do not in fact exist.

Other methods of treating automobile accident cases and the sleeping motorist have been suggested and employed. Texas imposes strict liability for violation of safety statutes. In a case where the defendant alleged that he was suddenly attacked by some ailment which rendered him unconscious and therefore unable to control his car, the court held that the mere fact that he was on the wrong side of the road subjected him to liability.[13] It has been suggested that the sleeping motorist be treated as engaged in ultrahazardous activity.[14]

It is a practical impossibility to determine how many cases involving a sleeping driver have reached the jury, or resulted in a verdict for the defendant at the trial court level. However, the mere possibility of such an eventuality has a practical value in that it can be employed as a tool in reducing damage figures in settlement proceedings. The elimination of the defense of unanticipated sleep, however weak it may have been, should result in more equitable settlements for injured plaintiffs.

The social policy underlying the decision in the *Theisen* case is sound. An automobile in motion is unquestionably a dangerous instrumentality and a driver should be compelled to employ every available precaution to prevent injury to others. Certainly falling asleep while driving is not an act of caution. Although no driver has heretofore excused himself from liability by alleging sleep, this decision eliminates the possibility that in future cases such a driver may be exonerated. By requiring a finding of negligence as a matter of law the case is kept free from the speculation of the jurors.

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[12] Krantz v. Krantz, *supra* note 5.

[13] Leary v. Oates, 84 S.W.2d 486 (Tex. Civ. App. 1935). The statute relied on was *Vernon's Penal Code* §801 (A) (B). Wisconsin Statutes (1961) §§346.05 and 346.13 are similar in their language, but they have not been interpreted as imposing strict liability.

[14] Paul D. Kaufan and Benjamin E. Kantrowitz, *The Case of the Sleeping Motorist,* 25 N.Y.U.L. REV. 362 (1950). "There is then, an ultra-hazardous activity, not that of driving an automobile, but that of remaining constantly capable of driving. It is the driver who has brought the car to the road, who has propelled and guided the engine and who owes the other highway users the absolute duty to stay awake while he drives."